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No. 302

In the Supreme Court of the United States

OCTOBER TERM, 1968

ANTHONY NUNZIO ODDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1968. The petition for a writ of certiorari was filed on July 18, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, after petitioner had been acquitted on two counts of passing counterfeit bills, evidence as to the passing of such bills was properly introduced in the retrial of a third count, as bearing on knowledge and intent.

316-726—68

STATEMENT

After a jury trial in the Southern District of Florida, petitioner was convicted on one count of an indictment which charged that on December 7, 1965, he passed a counterfeit ten-dollar bill in violation of 18 U.S.C. 472. On May 19, 1967, petitioner was sentenced to two years' imprisonment. The court of appeals affirmed.

The evidence showed that on December 7, 1965, a bag boy at a supermarket in Hillandale, Florida, witnessed the making, in rapid succession, of three small purchases by petitioner and a companion, Esterkes. In each instance a ten-dollar bill was tendered and approximately $9 received in change (R. 31–32). As the men departed the store area, the bag boy called for an examination of the bills (R. 33). Two of the bills (Govt. Exs. 1 and 2) turned out to be counterfeit, bearing the same serial numbers (R. 33, 87).

Esterkes testified for the government that on December 7 petitioner had invited him to go to the supermarket to pick out what he wanted. Petitioner gave him a ten-dollar bill and he returned the change to petitioner (R. 159). About two weeks later petitioner had approximately $150 in his possession, all in ten-dollar bills, and showed these to Esterkes and told him the bills were counterfeit (R. 161).

Sometime thereafter, but before December 17, 1965, petitioner gave Dr. Cohen, his physician, approximately three ten-dollar bills (R. 140) by placing them in Dr. Cohen's pocket (R. 138). Dr. Cohen, on December 17, paid a portion of his account at Continental Jewelry in Miami with the bills received from

petitioner and with other currency in his possession (R. 140). Dr. Cohen believed that the bills he received from the petitioner were ten-dollar bills (R. 142). The owner of the jewelry company testified that Dr. Cohen was the only source for all currency on hand at the close of business on December 17 (R. 118) because a bank deposit had been made earlier that day (R. 120). Three of the ten-dollar bills (Govt. Exs. 3, 4, 5) so received by the jewelry company were counterfeit (R. 195, 150–152).[1] One (Govt. Ex. 4) bore the same serial number as the two counterfeit bills passed at the supermarket (R. 197). A Secret Service expert testified that since all five bills had the same defects they had been made by the same maker (R. 195).

Petitioner was originally tried on three counts of passing counterfeit bills, based on the bills tendered by Esterkes (Count I); petitioner's own tender of a bill to the second cashier at the supermarket (Count II); and the giving of the money to Dr. Cohen (Count III). At this first trial the jury acquitted petitioner as to the first count involving Esterkes (R. 12). The jury was unable to agree as to Count II. The count involving Dr. Cohen resulted in a directed verdict of acquittal (R. 15).

At the second trial, involving Count II, the defense contended that since petitioner had been acquitted of the other counts, evidence with respect thereto could not be offered to show a pattern of conduct or intent

[1] The jewelry company advised Dr. Cohen of the defective nature of the three bills. He, in turn, advised petitioner and petitioner thereafter reimbursed Dr. Cohen (R. 141).

(R. 14). The trial judge overruled this objection (R. 21). He permitted counsel to inform the jury of the prior acquittal (R. 21). In his final instructions the trial judge also so informed the jury (R. 208), and instructed as to the limited purpose of the evidence (R. 209).[2]

ARGUMENT

It has long been held that evidence of prior or subsequent transactions, which did not lead to conviction, may be introduced if they shed light on the intent of the defendant in committing the acts for which he is being tried. *United States* v. *Kelley,* 186 F. 2d 598 (C.A. 7), certiorari denied, 341 U.S. 954; *Schmeller* v. *United States,* 143 F. 2d 544, 551 (C.A. 6); cf. *Glasser* v. *United States,* 315 U.S. 60, 81–82. In this case, it was relevant to show, as bearing on knowledge and intent, that petitioner not only passed a counterfeit bill, but that bills he had given a friend and to his doctor turned out to be counterfeit. These were circumstances which the jury had a right to consider when trying petitioner for the bill which he passed, even though a judge or jury might not have considered the circumstances sufficient to prove beyond a reasonable doubt that petitioner was criminally responsible for the passing of the other bills.[3] The acquittal as to the other counts did not alter the cir-

[2] At the retrial the record of the first trial was not proffered by either counsel. Counsel were unable to agree as to the basis for the first trial's directed verdict of acquittal (R. 192–193).

[3] Since the retried count was for an offense separate from those which involved Esterkes and Dr. Cohen, there is no issue of double jeopardy. See *United States* v. *Kramer,* 289 F. 2d 909, 913 (C.A. 2).

cumstance that bills of the same character as that which petitioner was charged with passing had been found in the hands of persons connected with him. The acquittals were thus not *res judicata* as to these factual circumstances. The jury received this evidence under proper safeguards, including the information that the previous jury had acquitted as to the Esterkes count and the trial court had entered a judgment of acquittal under the count that involved Dr. Cohen. The evidence was admissible for the limited purpose for which it was received. See *Pilcher* v. *United States,* 113 Fed. 248 (C.A. 5); *Hernandez* v. *United States,* 370 F. 2d 171 (C.A. 9). See, also, *United States* v. *Davis,* 369 F. 2d 775 (C.A. 4), certiorari denied, 386 U.S. 909; *Orlando* v. *United States,* 377 F. 2d 667 (C.A. 9).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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